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No. _____ OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1996

JEFFREY B. HOPKINS,

Petitioner,

v.

KEN MARKS FORD and PCA SOLUTIONS, INC.,

Respondents.

On Petition For A Writ Of Certiorari To The First District Court Of Appeal Of The State Florida

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether Florida Statute Section 440.15(5)(a) (Supp. 1994) which is a codification of the misrepresentation defense in worker's compensation cases in the state of Florida, is in conflict with 42 U.S.C. § 12112(4)(A) & (B) and is thus preempted by said statute?

PARTIES TO THE PROCEEDING

The Petitioner, JEFFREY B. HOPKINS, is a resident of Oldsmar, Hillsborough County, Florida. Petitioner was the Petitioner before the District Court of Appeal, First District, State of Florida; and the Claimant before the Judge of Compensation Claims, District "E", State of Florida.

Respondent, KEN MARKS FORD, is a Florida corporation licensed to do business in the state of Florida. The Respondent, PCA SOLUTIONS, INC. is a Florida corporation licensed to do business in the state of Florida. Respondents were the Appellees before the First District Court of Appeal, State of Florida; and the Employer and Carrier, respectively, before the Judge of Compensation Claims, District "E", State of Florida.

There are no other parties to this action. However, since the constitutionality of Florida Statute Section 440.15(5)(a) (Supp. 1994) is drawn into question, 28 U.S.C. § 2403(b) may apply to this action and the Attorney General for the State of Florida has been duly served and notified of this proceeding.

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OPINIONS BELOW

The order denying the Motion for Rehearing of the District Court of Appeal, First District, that gives rise to this petition is *Hopkins v. Ken Marks Ford and PCA Solutions, Inc.*, Case No. 95-04502, dated February 25, 1997. The Per Curiam affirmation of the Florida First District Court of Appeal is *Hopkins v. Ken Marks Ford and PCA Solutions, Inc.*, Case No. 95-04502, dated January 16, 1997. These unpublished decisions and the unpublished order of the Judge of Compensation Claims, District "E", State of Florida are reprinted herein as Appendix I, II, and III.

BASIS FOR JURISDICTION

This case was originally decided by Order of the Judge of Compensation Claims, Donna Remsnyder on December 6, 1995. A timely Appeal was filed with the First District Court of Appeal and a decision affirming the Order of the Judge of Compensation Claims, Per Curiam, was entered on January 16, 1997. A timely Motion For Rehearing was filed on January 30, 1997 and subsequently denied on February 27, 1997 without opinion. Because there is no conflict between this decision and any other Florida decision addressing the same or similar subject, the decision of the First District constitutes a decision of a state court of last resort and this court has jurisdiction pursuant to 28 U.S.C. § 1257.

This court has jurisdiction to review this case On Writ Of Certiorari pursuant to Rule 10 of the Rules of the Supreme Court because this decision conflicts with a decision of another state court of last resort, the Supreme

Court of Minnesota in *Huisenga v. Opus Corp. et al.*, 494 N.W. 2d 469 (Minn. 1992); with a decision of the United States Court of Appeals for the First Circuit in *Grenier v. Cyanamid Plastics*, 70 F.3d 667 (1st Cir. 1995) and because this decision affects an important question of federal law: whether the Americans With Disabilities Act prevents employers from inquiring into an employees medical history and using the results of the inquiry to deny the employee workers' compensation benefits and whether the Americans With Disabilities Act prevents a state from passing a law allowing the employer to make such an inquiry.

Since this case affects the constitutionality of a state statute, 28 U.S.C. § 2403(b) may apply and the Attorney General of the State of Florida has been served with a copy of this Petition. The undersigned is unaware and has received no notice that any Florida court has notified the State Attorney General that the constitutionality of a state statute was drawn into question.

STATUTORY PROVISIONS INVOLVED

Florida Statute § 440.15(5)(a) (Supp. 1994) provides in pertinent part:

> (a) . . . except that no benefits shall be payable if the employee, at the time of entering into the employment of the employer by whom the benefits would otherwise be payable, falsely represents himself in writing as not having previously been disabled or compensated because

> of such previous disability, impairment, anomaly, or disease *and the employer detrimentally relies on the misrepresentation* . . .

The Americans With Disabilities Act, Title I, 42 U.S.C. § 12112(d)(4) provides in pertinent part:

> (4) Examination and inquiry. (A) Prohibited examinations and inquiries. A covered entity shall not require a medical examination and shall not make inquiries of an employee as to whether such employee is an individual with a disability or as to the nature or severity of the disability, unless such examination or inquiry is shown to be job related or consistent with business necessity.
>
> (B) Acceptable examinations and inquiries. . . . A covered entity may make inquiries into the ability of an employee to perform job-related functions.

The Americans With Disabilities Act, Title I, 42 U.S.C. § 12102(2) provides in pertinent part:

> (2) Disability. The term "disability" means, with respect to an individual –
>
> (C) being regarded as having such an impairment.

STATEMENT OF THE CASE

The essential facts of this case are contained in the Order of the Judge of Compensation Claims dated December 6, 1995. (App. I):

> 1. Petitioner, Jeffrey Hopkins, suffered an accident at work on December 21, 1994, wherein he

suffered a herniated disc at the level of L5-S1 (Finding of Fact #2).

2. Petitioner had suffered a prior accident in 1987 wherein he injured his lower back at the L4-L5 level (Finding of Fact #2).

3. Petitioner filled out an application with the employer on January 4, 1994, for the position of painter's helper. On or about January 5, 1994, the Employer, through its body shop supervisor, hired the Petitioner to work. Following the offer of hire and acceptance by the Petitioner, the Employer requested that the Petitioner fill out a pre-placement questionnaire (App. IV) in order to determine if any accommodations needed to be made for the Petitioner from a physical standpoint. The Petitioner, along with assistance from his girlfriend, inaccurately completed the pre-placement questionnaire. The Petitioner directed his girlfriend to intentionally put down false responses to the questions about the claimant's prior medical condition. The Petitioner's sole reason for doing so was because he was afraid that the Employer might not hire him if the employer knew that he had prior back injuries, including two laminectomies at the L4-L5 level of his spine. The Petitioner wanted to get a job with a car dealership because he wanted health insurance and other benefits and believed that if he were to disclose that he had prior back injuries, that it would jeopardize his opportunity to get a job. Likewise, Petitioner intentionally did not fill in a blank concerning a question about whether he had received prior workers' compensation and disability benefits, because the claimant was afraid that his Employer would speculate about his prior

receipt of benefits and it might jeopardize his obtaining a job (Finding of Fact #7).

4. Thereafter, on December 21, 1994, the Petitioner was called upon by his supervisor to assist the supervisor and two other coworkers in lifting a heavy truck bed. After completing that task, they lifted another truck bed. Following these lifting episodes, the Petitioner felt sick to his stomach and became dizzy. After a short while, he resumed his activities. Thereafter, the Petitioner climbed underneath the front end of an automobile to pull a bumper loose. Afterwards, as he was attempting to stand up, he felt something snap in his back; he fell down to his knees, and felt a sharp pain going down his right leg. Subsequent medical treatment and testing indicated that the Petitioner had a herniated disc at the L5-S1 of the spine (Finding of Fact #8).

5. The Petitioner testified that he had a severe strain to his lower back in 1985, that was complicated by sciatica, and he had to undergo a series of steroid shots by a doctor. The Petitioner was out of work for seven months. Additionally, in 1987, while Petitioner was working for an auto painting company in Illinois, he injured his lower back again, and in February of 1988, he underwent his first laminectomy at the L4-L5 level of his spine. Petitioner did not have a good result from that surgery and in August of 1988, he underwent a second surgery at the L4-L5 level of his spine. The Petitioner was off several months due to these prior surgeries from a work-related accident. Additionally, the Petitioner was aware that he had physical limitations from his prior back injury, as he testified

that whenever he was in control of the situation in the body shop with regard to lifting truck beds, he would get several co-workers to help because he knew he had a prior back injury and needed to be careful. Petitioner testified that it was in the back of his mind that he had two prior back injuries, and he did not need to be killing himself doing these things. (Finding of Fact # 9(a)).

6. The Employer's representative testified that the pre-placement questionnaire is used to help determine if any accommodations are needed in a job because of any special needs or limitations of an employee. The body shop supervisor that hired Petitioner testified that if the Petitioner had been truthful about his prior back injuries, he would have made accommodations for the Petitioner so that he was not doing any heavy lifting or alternatively, he may even have considered whether or not the Petitioner was physically capable of performing the job he was hired to do. Additionally, the supervisor testified that he might have required the Petitioner to have obtained clearance from a physician regarding the job position with regard to his back condition. However, by the Petitioner's failure to be truthful about his prior back problems and limitations, the Employer did not have the opportunity to make accommodations for the Petitioner, or to investigate in more detail as to whether or not the Petitioner would be capable of performing the physical activities of the job that he was hired to perform. At any rate, the Employer did not undertake any of these steps because the Petitioner failed to reveal his prior back problems and the Employer relied on those false representations (Finding of Fact #9(b)).

7. The only medical expert to testify as to the issue of a medical causal relationship between the current injury and the Petitioner's prior injury, is John Leavengood, M.D., a board certified neurologist. Dr. Leavengood's unrefuted opinion is that within a degree of reasonable medical probability the Petitioner's prior surgeries at the L4-L5 level of his spine, made the Petitioner more pre-disposed to have an injury at the L5-S1 level of the spine that was injured on December 21, 1994 (Finding of Fact #9(d)).

8. The Identification and Pre-placement Questionnaire, Employer's Exhibit #1 to the deposition of Jeffrey Hopkins, The Employer/Carrier's Exhibit #1 at the final hearing (Order, p. 2) (App. IV), asked the following questions:

a. Do you have or have you had any physical disability or impairment?

b. Have you ever injured or sprained your back? Your neck?

c. If yes, did you receive treatment from a doctor?

d. If yes, when? Where?

e. Have you ever received any workers' compensation or disability benefits? If yes, explain.

f. Do you have, or have you ever had, any of the following?

Eye Trouble
Hearing Trouble
Heart Trouble
Epilepsy
High Blood Pressure

Diabetes
Arthritis
Allergic Conditions
Broken Bones
Other

9. According to Karen Lee Jones, the Personnel director for the Employer, Ken Marks Ford, the employer employed 250 employees at the time (R-196, App. V).[1] Ms. Jones also explained the hiring procedures of the employer. All employees were required to fill out an employment application and after being hired they were given the pre-placement questionnaire and asked the questions referenced in paragraph 8 above. No employees were given physical examinations. (R-206-216, App. V).

10. According to Robert Leis, who was the body shop director who hired the Petitioner (R-235, 236, App. VI), the Petitioner was a good employee for the eleven months he worked prior to his accident (R-237, App. VI).

This case originated as a worker's compensation proceeding before a Judge of Compensation Claims. According to Florida law, Judges of Compensation Claims do not have jurisdiction to hear constitutional issues; *Smith v. Piezo Technology and Professional Administrators,* 427 So. 2d 182 (Fla. 1983). The appropriate procedure is to create a record before the Judge of Compensation Claims and raise the issue on appeal which Petitioner did; *Sasso v. Ram Property Management,* 431 So. 2d 204 (Fla. 1st DCA 1983), *approved,* 452 So. 2d 932 (Fla. 1984), *appeal dismissed,*

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[1] The employer is a covered entity under the ADA; 42 U.S.C. § 12111(5).

469 U.S. 1030, 105 S.Ct. 498, 83 L. Ed. 2d 391 (1984). The federal question raised on appeal was whether the Americans With Disabilities Act (hereinafter the ADA) 42 U.S.C. § 12101 et seq. (1990), pre-empted Florida Statute § 440.15(5)(a) (Supp. 1994) and prevented the application of the misrepresentation defense to deny Petitioner workers' compensation benefits; (see App. VII which contains the Order of the court requiring supplemental briefs on jurisdiction, and the Supplemental Brief, App. VIII.)

The First District Court of Appeal affirmed the decision of the Judge of Compensation Claims without opinion on January 16, 1997, citing the cases of *Hensley v. Punta Gorda,* No. 96-358 (Fla. 1st DCA January 6, 1997) and *Sasso v. Ram Property Management supra* as authority for its decision (App. II). A timely motion For Rehearing was filed on January 30, 1997 and subsequently denied without opinion on February 25, 1997 (App. III). Since the decision of the First District Court of Appeal was per curiam and since there is no arguable conflict between the cases cited by the First District, *Hensley, supra,* and *Sasso, supra,* in its opinion and any other case decided in the state of Florida on this issue, the decision of the First District constitutes a decision of the highest state court empowered to hear the cause; *Jenkins v. State,* 385 So. 2d 1356 (Fla. 1980), *The Florida Star v. B.J.F.,* 530 So. 2d 286 (Fla. 1988).

This court has jurisdiction to hear this case because the decision in this case conflicts with the decision of the Supreme Court of Minnesota in *Huisenga v. Opus Corp. et al.,* 494 N.W. 2d 469 (Minn. 1992), the decision of the First Circuit Court of Appeals in *Grenier v. Cyanamid Plastics,* 70 F.3d 667 (1st Cir. 1995) and because the decision in this

case allows employers in Florida to use answers to post employment questionnaires which violate the clear proscriptions of the Americans With Disabilities Act, to deny workers' compensation benefits to qualified individuals with a disability, thus discriminating against those persons.

ARGUMENT

Florida has addressed the Americans with Disabilities Act (the ADA) and its relationship to the Florida Workers' Compensation Act (the FWCA) on two significant occasions: In *Barry v. Burdines*, 675 So. 2d 587 (Fla. 1996), the claimant contested the application of Fla. Stat. § 440.15(3)(b)4.d., which limited him to the receipt of workers' compensation benefits to seventy-eight weeks based on an impairment rating of nine percent. The claimant contended that the above section of the FWCA violated Title I of the ADA because it segregated disabled individuals arbitrarily and deprived them of an individual assessment of their disabilities.

The Supreme Court found that the ADA was broad enough to encompass the FWCA. Thus, if there was a conflict between the two laws, the ADA would supersede the FWCA. However, the court went on to find there was no conflict. The court pointed out that the purpose of the two legislative enactments was different. The ADA was enacted *to prevent the prejudicial treatment of disabled persons and to allow such persons to compete in the workplace* . . . The court added that the ADA requires *the removal of all artificial, arbitrary, and unnecessary barriers to*

employment when the barriers operate invidiously to discriminate . . . The FWCA, on the other hand was designed to provide the employee with an efficient delivery of medical and impairment benefits. The court further found that the impairment system set forth in § 440.15(3)(b)4.d. was a fair and efficient method of handling the large volume of workers' compensation claims filed in the state.

In *Hensley v. Punta Gorda,* Case No. 96-358 (Florida First DCA, January 6, 1997) the claimant once again contended that she was precluded from receiving benefits because a specific section of the FWCA, section 440.02(1) which excludes mental or nervous injuries from coverage, violated the ADA. In denying Hensley's appeal, the First District Court of Appeal raised a new barrier not mentioned in *Barry*. The court held that in order to have standing to raise an ADA violation, the claimant had to establish that she was a *qualified individual with a disability*. The court went on to state that the term must be defined in the present tense. Thus, anyone claiming entitlement to temporary total disability benefits or temporary partial disability benefits could not meet the definition and therefore, did not have standing under the ADA. The First District then went on to repeat the holding in *Barry* that the purpose and function of the FWCA is different from the ADA and for that reason, the instances of actual conflict between the two will be rare.

The holding in *Hensley,* particularly as to standing, effectively precluded most challenges to the FWCA as violating the ADA for the simple reason that most workers' compensation cases involve a claim for some type of disability benefits. However, this case is one of

those rare instances where there is a conflict between the ADA and the FWCA.

What distinguishes this case from *Barry* and *Hensley*? First and foremost, the Petitioner never filed a claim alleging he was entitled to benefits or greater benefits under the FWCA because the FWCA was in conflict with the ADA as the claimants in *Hensley* and *Barry* did, respectively. The Petitioner merely filed a claim for workers' compensation benefits as a result of an accident. It was the Employer who raised the ADA issue by stating that Petitioner misrepresented his physical condition at the time of employment, and therefore, should be precluded from receiving benefits because of that misrepresentation.

To digress for a moment, the misrepresentation defense was first delineated in Florida in the landmark case of *Martin v. Carpenter,* 132 So. 2d 400 (Fla. 1961). The four criteria for establishing a misrepresentation defense, as the Judge of Compensation Claims pointed out in her Order (App. I), are a misrepresentation of the claimant's physical condition on the employment application; reliance on the misrepresentation; a subsequent injury; and a causal relationship between the subsequent injury and the prior injury. The reliance factor was usually proven by the employer testifying that it would not have hired the employee had it known of his or her disability; *Doric Food Co. v. Allen,* 383 So. 2d 316 (Fla. 1st DCA 1980). In this case, the reliance factor was proven by the Employer testifying that it would have reasonably accommodated the Petitioner had it known of his disability (Order, Finding of Fact # 9(b)). The misrepresentation

defense has been codified in Florida Statute § 440.15(5)(a) (Supp. 1994).

The important conclusion to draw from the above discussion of Florida law is that the Employer, by raising the misrepresentation defense, took the position that the Petitioner was a *qualified individual with a disability* . . . To restate it, by raising the misrepresentation defense, the Employer took the position that the Petitioner was disabled *at the time of employment* because it would not have hired him without making reasonable accommodation for his disability.[2] The definition of disability under the ADA includes *being regarded as having such an impairment* (42 U.S.C. § 12102(2)(C)); *Equal Employment Opportunity Commission v. Texas Bus Lines*, 923 F. Supp. 965 (S.D. Tex. 1996). Thus, this Petitioner, unlike Judy Hensley, has standing to claim that the ADA preempts the FWCA in this case.[3]

The core question is whether § 440.15(5)(a) (Supp. 1994), as interpreted by the Florida courts causes prejudicial treatment to disabled persons or those perceived as

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[2] The employer can argue that it may not have hired the Claimant at all and thus he was not otherwise qualified, but the record shows that the Claimant worked for eleven months before his accident and did a good job (App. VI).

[3] There is still a question whether an applicant has to prove standing under 42 U.S.C. § 12112(d). At least one district court has ruled that way. (*Armstrong v. Turner*, Case No. 95-1938-B-1 (M.D. La. 1996)). However, other appellate decisions at least infer that standing is unnecessary under this section; (*Doe and EEOC v. Kohn, Nast & Graf*, 866 F. Supp. 190 (E.D. Pa. 1994); *Barnes v. Cochran*, 944 F. Supp. 897 (S.D. Fla. 1996); *Grenier v. Cyanamid Plastics*, 70 F.3d 667 (1st Cir. 1995).

disabled and operates to prevent such persons from competing in the workplace and whether the above statute creates an artificial, arbitrary, and unnecessary barrier to employment. Petitioner contends that it does and that this is one of those rare occasions where the FWCA conflicts with the ADA.

42 U.S.C. § 12112(d)(4) is the section of the ADA dealing with post employment inquiries.[4] It states in pertinent part:

> "(4) Examination and inquiry. (A) Prohibited examinations and inquiries. A covered entity shall not require a medical examination and shall not make inquiries of an employee as to whether such employee is an individual with a disability or as to the nature or severity of the disability, unless such examination or inquiry is shown to be job-related and consistent with business necessity.
>
> (B) Acceptable examinations and inquiries. A covered entity may conduct voluntary medical examinations, including voluntary medical histories, which are part of an employee health program available to employees at that work site. A covered entity may make inquiries into the ability of an employee to perform job-related functions."

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[4] Petitioner would point out that there is no real distinction between pre-employment and post employment in this case. The employer gives the employee the questionnaire immediately after they are hired.

The above section of the ADA clearly exists because Congress made the determination that pre and post employment inquiries by the employer into an employees medical history without some type of showing that the inquiry is related to the specific job the applicant is about to perform or the employee is performing, is, in and of itself an arbitrary, artificial, and unnecessary barrier to employment. It is the Petitioner's position that the questions asked in the pre-placement questionnaire in this case (App. IV), which are asked of all employees regardless of the specific job, violate the above section of the ADA and, therefore constitute an arbitrary, artificial, and unnecessary barrier to employment. It is further the Petitioner's position that a state statute which allows an Employer to ask those questions and then deny worker's compensation benefits to an employee based on the answers to those questions, is in direct conflict with the above section of the ADA because it creates an economic benefit for the Employer to ask the questions, thus encouraging discriminatory behavior against the disabled or those perceived to be disabled.

In addition, there is simply no argument that the questions asked in the pre-placement questionnaire of all employees (App. IV) can fit the requirement of being job-related. The Code of Federal Regulations, 29 C.F.R. § 1630.14(a) provides a definition of job-related:

> "Employers are permitted to make pre-employment inquiries into the ability of an applicant to perform job-related functions. This inquiry must be narrowly tailored. The employer may describe or demonstrate the job function and

> inquire whether or not the applicant can perform the function with or without accommodation . . .
>
> An employer may not use an application form that lists a number of disabling impairments and ask the applicant to check any of the impairments he or she may have. In addition, as noted above, an employer may not ask how a particular individual became disabled or the prognosis of the individual's disability . . . "[5]

Petitioner cites one case to this court which addresses the exact same factual situation as the present case. In *Huisenga v. Opus Corp., et al.*, 494 N.W. 2d 469 (Minn. 1992), the Minnesota Supreme Court was faced with a pre-employment questionnaire that asked the same general questions as in this case: Have you ever had a back injury? Have you ever received worker's compensation benefits? etc.. The employee who had a prior back injury answered "no". There was a workers' compensation misrepresentation defense which was the same as the *Martin v. Carpenter,* defense. The court held that the pre-employment questionnaire was not designed to ferret out only those disabilities which would hamper the applicant from doing the essential functions of the job. The court further held that the questions violated the Minnesota Human Rights Act. Finally, the court held that the employer could not use the employee's responses to the questions

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[5] Although this section relates to pre-employment inquiry, the definition of job-related functions should be the same; *Roe v. Cheyenne Mountain Conference Resort,* 920 F. Supp. 1153 (D.C. Colo. 1996); see also the discussion in *Barnes v. Cochran* and *Granier v. Cyanamid Plastics* at footnote 3.

to support a misrepresentation defense in a workers' compensation proceeding.

Petitioner believes there is a conflict between the decision in this case and the decision in *Grenier v. Cyanamid Plastics,* not because of the holding in *Grenier,* but because *Grenier* discusses in detail the correct application of 42 U.S.C. § 12112(d).

The First District Court of Appeal in Florida should have arrived at the same conclusion as the Supreme Court of Minnesota in *Huisenga.*

Respectfully submitted,

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APPENDIX 1

STATE OF FLORIDA

DEPARTMENT OF LABOR AND EMPLOYMENT SECURITY

OFFICE OF THE JUDGE OF COMPENSATION CLAIMS

DISTRICT E

Jeffrey B. Hopkins Claimant		
vs. Ken Marks Ford PCA Solutions, Inc. Employer/Carrier	Claim No.: D/A:	350-52-8028 12/21/94

James A. Sheehan, Esq., St. Petersburg, for Employee

Gary E. Frazier, Esq., St. Petersburg, for Employer/Carrier

ORDER

After due notice to all parties a final hearing on the merits of this claim was held on November 15, 1995 in St. Petersburg, Pinellas County, Florida. The claim was summarily decided on November 27, 1995.

The claim was for temporary total, temporary partial or wage loss benefits from date of accident to present and continuing; payment of past due medical bills; continuing medical treatment, specifically either an orthopedic or a neurological physician; penalties, interest, costs and attorney's fees.

The defenses were no injury by accident arising out of employment; *Martin v. Carpenter*; misrepresentation of prior physical condition; apportionment; no medical evidence of temporary total/temporary partial disability; no good faith job search; that no penalties, interest, costs nor attorney's fees were due and owing.

The following documentary items were received into evidence:

1. The pretrial stipulation sheet dated October 3, 1995 together with the documentary items required by Rule 4.180 (Court's Exhibit #1).

2. Medical Composite (Claimant's Exhibit #1).

3. Deposition of claimant, Jeffrey Hopkins, taken September 5, 1995 (Employer/Carrier's Exhibit #1).

4. Deposition of Karen Jones taken on October 26, 1995 (Employer/Carrier's Exhibit #2).

5. Deposition of Robert Leis taken on October 26, 1995 (Employer/Carrier's Exhibit #3).

6. Deposition of John Leavengood, M.D. taken on November 7, 1995 (Joint Exhibit #1).

At the hearing, the claimant, Jeffrey Hopkins, Karen Jones and Robert Leis appeared and testified before me.

In making my findings of fact and conclusions of law, I have carefully considered and weighed all the evidence presented to me. I have observed the candor and demeanor of the witnesses, and I have resolved all of the conflicts in the testimony and evidence. Based on the foregoing and the applicable law I make the following findings:

1. Those items to which the parties were in agreement on the pretrial stipulation sheet are accepted and adopted as findings of fact.

2. The parties stipulated that the undersigned had jurisdiction over the subject matter and parties and that there was an employer-employee relationship on the date of the alleged accident.

3. The parties stipulated that the Claimant suffered an accident on December 21, 1994, wherein he suffered a herniated disc at the L5-S1 level. The parties stipulated that the Claimant had suffered a prior accident in 1987 wherein he injured his low back at the L4-L5 level.

4. The parties stipulated that if the claim was found to be compensable that they would administratively handle the payment of the outstanding medical bills.

5. The parties stipulated to an average weekly wage of $527, with fringes of $37.44 which had not yet been terminated, which gave the Claimant a corresponding compensation rate of $351.33.

6. It was the Claimant's position that he had not yet attained maximum medical improvement (MMI). The Employer/Carrier did not have a position with reference to MMI.

7. The Claimant filled out an application for employment with the Employer herein on January 4, 1994, for the position of painter's helper. On or about January 5, 1994, the Employer, through its body shop supervisor, hired the Claimant to work. Following the offer of hire and the acceptance by the Claimant, the Employer requested that the Claimant fill out a pre-

placement questionnaire in order to determine if any accommodations needed to be made for the Claimant from a physical standpoint. The Claimant, along with assistance from his girlfriend, inaccurately completed the pre-placement questionnaire. The Claimant directed his girlfriend to intentionally put down false responses to the questions asked about the Claimant's prior medical condition. The Claimant's sole reason for doing so was because he was afraid that the Employer might not hire him if the Employer knew that he had prior back injuries, including two laminectomies at the L4-L5 level of his spine. The Claimant wanted to get a job with a car dealership because he wanted health insurance and other benefits and believed that if he were to disclose that he had prior back injuries, that it would jeopardize his opportunity to get a job. Likewise, the Claimant intentionally did not fill in a blank concerning a question about whether he had received prior workers' compensation and disability benefits, because the Claimant was afraid that his Employer would speculate about his prior receipt of benefits and it might jeopardize his obtaining a job.

8. Thereafter, on December 21, 1994, the Claimant was called upon by his supervisor to assist the supervisor and two other co-workers' in lifting a heavy truck bed. After completing that task, they lifted another truck bed. Following these lifting episodes, the Claimant felt sick to his stomach and became dizzy. After a short while, he resumed his activities. Thereafter, the Claimant climbed underneath the front end of an automobile to pull a bumper loose. Afterwards, as he was attempting to stand up, he felt something snap in his back; he fell down to his knees, and felt a sharp pain going down his right leg.

Subsequent medical treatment and testing indicated that the Claimant had a herniated disc at the L5-S1 of the spine.

9. A misrepresentation defense is codified in §440.15(5)(a) *Fla. Stat.* (1993) and in the case of *Martin Company, v. Carpenter,* 132 So.2d 400 (Fla. 1961). The four elements of that defense for denying compensation and their application to the facts in this case are as follows:

(a) **The Employee knew the misrepresentation of his prior physical condition to be false.** The Claimant testified that he had a severe strain to his lower back in 1985, that was complicated by sciatica, and he had to undergo a series of steroid shots by a doctor. The Claimant was out of work for seven (7) months. Additionally, in 1987, while the Claimant was working for an auto painting company in Illinois, the Claimant injured his lower back again, and in February of 1988, he underwent his first laminectomy at the L4-L5 level of his spine. The Claimant did not have a good result from that surgery and in August of 1988, he underwent a second surgery at the L4-L5 level of his spine. The Claimant was off work for several months due to these prior surgeries from a work-related accident. Additionally, the Claimant was aware that he had physical limitations from his prior back injury, as he testified that whenever he was in control of the situation in the body shop with regard to lifting truck beds, he would get several co-workers to help because he knew he had a prior back injury and he had to be careful. The Claimant testified that it was in the back of his mind that he had two prior back injuries, and he did not need to be killing himself doing these things. Moreover, the Claimant was very candid in his testimony concerning

the intentional misrepresentation of his prior back condition. He testified that he understood the questions being asked on the pre-placement questionnaire concerning the prior medical history and basically misrepresented the fact that he had a prior back injury and surgeries because he had an opportunity to get a good job, and he felt like if he had disclosed this information concerning his prior back injuries, it would have jeopardized his opportunity to get that job.

(b) **The Employer relied upon the false representation of the Employee.** The Employer's representatives testified that the pre-placement questionnaire is used to help determine if any accommodations are needed in a job because of any special physical needs or limitations of an employee. The body shop supervisor that hired the Claimant testified that if the Claimant had been truthful about his prior back injuries, he would have made accommodations for the Claimant so that he was not doing any lifting or alternatively, he may even have reconsidered whether or not the Claimant was physically capable of performing the job that he was hired to do. Additionally, the supervisor testified that he might have required the Claimant to obtain clearance from a physician regarding the job position with regard to his back condition. However, by the Claimant's failure to be truthful about his prior back problems and limitations, the Employer did not have the opportunity to make accommodations for the Claimant or to investigate in more detail as to whether or not the Claimant would be capable of performing the physical activities of the job that he was hired to perform. At any rate, the Employer did not undertake any of these steps because the Claimant failed

to reveal his prior back problems and the Employer relied upon those false representations. See *Colonial Care Nursing Home v. Norton,* 566 So.2d (Fla. 1st DCA, 1990); *Kalbes v. Armour Industrial Security,* 483 So.2d 124 (Fla. 1st DCA, 1986); *Montgomery Ward & Company v. Provenzano,* IRC Order 2-3533 (September 11, 1978); *cert. denied, Provenzano v. Montgomery Ward & Company,* 347 So.2d 100 (Fla. 1979).

(c) **Reliance by the Employer resulted in subsequent injury to the Employer.** The injury to the Employer is two-fold. Without having had the opportunity to make the accommodations for the Claimant because of his prior physical problems with his lower back, the Employer is now faced with a claimed workers' compensation injury with potential payment for indemnity benefits and significant medical bills. As noted by the Florida Supreme Court, it is also of importance that the Employer is now precluded from perfecting a claim for reimbursement against the Special Disability Trust Fund for any indemnity and medical benefits that it may be called upon to pay due to the injury of December 21, 1994. *Martin Company v. Carpenter, supra.* The perfection of a Special Disability Trust Fund claim is not possible as the Employer in this case had no knowledge of the preexisting back injuries of the Claimant due to the Claimant's misrepresentations.

(d) **There has to be shown a medical causal relationship between the current injury and the prior injury.** The only medical expert to testify as to the issue of a medical causal relationship between the current injury and the Claimant's prior injury, is John Leavengood, M.D., a board certified neurologist. Dr. Leavengood's unrefuted opinion is that within a degree of

reasonable medical probability, the Claimant's prior surgeries at the L4-L5 level of his spine, made the Claimant more pre-disposed to have a problem at the L5-S1 level of the spine that was injured on December 21, 1994. I am accepting Dr. Leavengood's opinions that the Claimant's pre-existing condition predisposed him to have problems at the adjacent level of the spine which was injured in the subject accident, and as such, the Employer/Carrier has proven a medical causation as required by the case law. *Santos v. Scott Wetzel Services,* 463 So.2d 575 (Fla. 1st DCA 1985).

10. The Employer/Carrier have satisfied each and every element of a misrepresentation defense. Based upon §440.15(5)(a) *Fla. Stat.* (1993) and the case of *Martin Company v. Carpenter, supra,* I find that the Claimant is not entitled to compensation benefits as a result of the accident of December 21, 1994, due to his false representations.

WHEREFORE, based upon the above and foregoing, it is **ORDERED** and **ADJUDGED** that:

1. The Employee/Claimant's petition for workers' compensation benefits is hereby denied and dismissed.

2. The Employee/Claimant's petition for reimbursement of taxable costs and attorney's fees at the expense of the Employer/Carrier is hereby denied and dismissed.

DONE and ORDERED in Chambers.

/s/ Donna S. Remsnyder
Donna S. Remsnyder
Judge of Compensation Claims

I HEREBY CERTIFY that a copy of the foregoing has been furnished by U.S. Mail this 6th day of December, 1995, to the following:

Jeffrey B. Hopkins
562 Longwood Circle
Oldsmar, FL 34677

James Sheehan, Esquire
341 Third Street South
St. Petersburg, FL 33701

Gary E. Frazier, Esquire
RIDEN, EARLE & KIEFNER, P.A.
100 Second Avenue South
Suite 400, North Tower
St. Petersburg, Florida 33701

Mr. Robert Hudson
Ken Marks Ford, Inc.
24825 U.S. 19 North
Clearwater, FL 34623

Ms. Jane Dowdy
PCA Solutions, Inc.
Post Office Box 166007
Altamonte Springs, FL 32716

/s/ Helen Hosley
Secretary to
Judge of Compensation
Claims

APPENDIX 2

IN THE DISTRICT COURT OF APPEAL

FIRST DISTRICT, STATE OF FLORIDA

NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IF FILED

JEFFREY B. HOPKINS,

Appellant,

v. CASE NO. 95-4502

KEN MARKS FORD and PCA SOLUTIONS, INC.,

Appellees.

_____/

Opinion filed January 16, 1997.

An appeal from an order of the Judge of Compensation Claims Donna Remsnyder, Judge.

James A. Sheehan, St. Petersburg, for Appellant.

Gary E. Frazier of Riden, Earle and Kiefner, P.A., St. Petersburg, for Appellees.

PER CURIAM.

AFFIRMED. *See Hensley v. Punta Gorda*, No. 96-358 (Fla. 1st DCA January 6, 1997); *Sasso v. Ram Property Management*, 431 So. 2d 204 (Fla. 1st DCA 1983), *approved*, 452 So. 2d 932 (Fla.), *appeal dismised*, 469 U.S. 1030, 105 S.

Ct. 498, 83 L. Ed. 2d 391 (1984). ERVIN, KAHN, and DAVIS, JJ., CONCUR.

APPENDIX 3

DISTRICT COURT OF APPEAL, FIRST DISTRICT

Tallahassee, Florida 32399
Telephone No. (904) 488-6151

February 25, 1997

CASE NO: 95-04502

L.T. CASE NO. 350-52-8028

Jeffrey B. Hopkins v. Ken Marks Ford and PCA Solutions, Inc.

Appellant(s) Appellee(s)

BY ORDER OF THE COURT:

Motion for rehearing filed January 30, 1997 is DENIED.

I HEREBY CERTIFY that the foregoing is (a true copy of) the original court order.

/s/ Jon S. Wheeler
JON S. WHEELER, CLERK

/s/ By: Anne Moore
Deputy Clerk

Copies:

James A. Sheehan Gary E. Frazier

Identification and Preplacement Questionnaire

First name	MI	Last name	Soc. Sec. #	Telephone #
Jeffrey	B	Hopkins	350-52-8028	( )

Address	City	State	Zip
562 Longwood Circle	Oldsmar	Fl.	34677

Birthdate	Birthplace	Telephone #
12/15/55		( )

Anyone dependent on you in whole or in part? ☐ yes ☒ no — If yes, explain

Work History

Employer	Address		
Mint Restoration	1141 A. Court St. Clearwater Fl.		
Type of work done		From	To
restoring corvettes		April 93	Dec 93
Employer	**Address**		
Van Steel	1141 A Court St. Clearwater Fl		
Type of work done		From	To
restoring corvettes		Sept 93	Dec 93
Employer	**Address**		
Larson Marine	531 Seahorse Dr. Waukegan IL		
Type of work done		From	To
fiberglass lay up man		Nov 88	Oct 90
Employer	**Address**		
Type of work done		From	To

Medical History

Family physician	Address

When was your last physical exam?	Name and address of doctor who performed the exam

Do you have, or have you had, any physical disability or impairment? ☐ yes ☒ no If yes, please describe:

Have you ever injured or strained: your back? ☐ yes ☒ no your neck? ☐ yes ☒ no

If yes, did you receive treatment from a doctor? ☐ yes ☐ no

If yes, when?	Where?

Name and address of doctor who performed the treatment:

Have you ever received any workers compensation or disability benefits? ☐ yes ☐ no If yes explain:

Do you have, or have you ever had, any of the following?	Yes	No
Eye trouble	☐	☒
Hearing trouble	☐	☒
Heart trouble	☐	☒
Epilepsy	☐	☒
High blood pressure	☐	☒
Diabetes	☐	☒
Arthritis	☐	☒
Allergic conditions	☐	☒
Broken bones	☐	☒
Other	☐	☑

I certify the above answers are true and understand that any false or misleading statements may be reason for denial of workers' compensation benefits and/or termination of employment.

Jeffrey B Hopkins — 1/5/94

Applicant — Date

R. J. Lewis

Interviewer

ERC, INC. 1985

Rev 2/90

BEST AVAILABLE COPY

APPENDIX 4

0191

PERSONAL

PLEASE PRINT CLEARLY

Name Jeffrey B. Hopkins Date 1-4-94

Address 562 Longwood Circle Social Sec. NO. 350-52-8028

City Ohsimar State fl. Zip 34677 Phone No. 461-3000

How Long At Present Address? 4yrs Previous Address _____ How Long? _____

JOB DESCRIPTION

Position Applied For: Painter's Helper

Schedule Desired: ☒ Full Time ☐ Part Time ☐ Temporary

Are you willing to work overtime? yes Weekends? yes Holidays? yes

If part itme, specify what days and hours preferred _____

If hired, on what date will you be able to start work? Monday 1-

What starting salary will you consider? open

How did you hear about this job? friend Scott Perry

Have you ever worked for Ken Marks Ford? NO If yes, how long? _____

Previous position at Ken Marks Ford _____ Reason for Leaving _____

List any friends or relatives working with us now Scott Perry

SKILLS

COMPLETE IF APPLYING FOR CLERICAL/SECRETARIAL/TECHNICAL POSITION

Sales background
- ☐ Outside
- ☐ Inside
- ☐ Cold Sale
- ☐ Hot Lead

Office Experience
- ☐ Purchasing
- ☐ Supervision
- __ No. of People
- ☐ Credit Collection
- ☐ Office Management
- ☐ Handled Cash

Business Skills
- _____ Shorthand Speed
- _____ System Used
- _____ Typing Speed
- _____ 10 Key
- _____ Dictaphone
- _____ Hardware
- _____ Software

Word Processing Equipment (Specify) _____

Other Data Processing Machines and/or skills _____

EDUCATION

EDUCATIONAL BACKROUND

	Name and Address of School	No. of Years	Major Courses	Did You Graduate
High School	Zion Benton Zion, Ill.	4yrs.		yes
College or University				
Night School or Other				

ERC, INC. 1995 CLAIMS

List scholarships, academic honors, awards, memberships and elected offices held in extra-curricular school or professional activities (exclude those indicating race, religion, age, sex, color, national origin, handicap or Vietnam Veteran status) _____

App. 14

MILITARY

U.S. MILITARY SERVICE

Branch of Military Service Coast Guard

From Month Sept. Year 86 To Month Nov. Year 90

Applicable Experience

OTHER

Are you able to perform the job duties of the position for which you are applying?

Yes X No

Employment may be contingent on your passing a job related physical examination.

Do you use illegal drugs? Yes No X

Upon employment you will be required to take a drug test.

IMPORTANT

Have you ever been convicted of a crime, excluding misdemeanors and summary offenses? A conviction will not necessarily disqualify you form the job for which you have applied.

Yes No X If yes, describe in full

PERSON TO BE NOTIFIED IN CASE OF AN EMERGENCY

Name Elia Balli

Address 562 Longwood Circle Oldsmar Telephone No. 461-3000 work

If hired do you have a reliable means of transportation to get to work? yes

What is it? truck

If employed you will be required to submit proof of your legal right to work in the United States.

EXPERIENCE

EXPERIENCE (GIVE PRESENT OR LAST POSITION FIRST. IF ADDITIONAL SPACE IS NEEDED, ATTACH SEPARATE SHEET.)

COMPANY: Jan. Steel r
ADDRESS/PHONE NUMBER: 1141A Court Street 446-8448
TYPE OF BUSINESS/INDUSTRY: Corvette Specialist
EMPLOYED (MONTH & YEAR) FROM 91 TO 93
MONTHLY/WEEKLY/HOURLY SALARY OR WAGE BEGINNING ENDING
POSITIONS HELD: Bodyman
SUPERVISOR'S NAME/POSITION: Arte Dorsett manger
DESCRIBE YOUR DUTIES
MAY WE CONTACT? ☒ YES ☐ NO
REASON FOR LEAVING

COMPANY: Kotakis
ADDRESS/PHONE NUMBER: 71413 447-1952
TYPE OF BUSINESS/INDUSTRY: Body Shop
EMPLOYED (MONTHS & YEAR) FROM 91 TO 93
MONTHLY/WEEKLY/HOURLY SALARY OR WAGE BEGINNING ENDING
POSITIONS HELD: Bodyman
SUPERVISOR'S NAME/POSITION: George Kotakis
DESCRIBE YOUR DUTIES
MAY WE CONTACT? ☒ YES ☐ NO
REASON FOR LEAVING

SPEC. INC. 1405

APPENDIX 5

[p. 1] STATE OF FLORIDA
DEPARTMENT OF LABOR
AND EMPLOYMENT SECURITY
DIVISION OF WORKERS' COMPENSATION

EMPLOYEE:	JEFFREY B. HOPKINS
EMPLOYER:	KEN MARKS FORD
CARRIER:	PCA SOLUTIONS
CLAIM NO.:	350-52-8028
D/A:	12/21/94

DEPOSITION OF: KAREN JONES

TAKEN BY:	Attorney for Employee/Claimant
DATE:	Thursday, October 26, 1995
TIME:	Commencing at 1:55 p.m.
PLACE:	Executive Reporting service 200 Central Avenue Suite 400 St. Petersburg, Florida
REPORTED BY:	Mary Ward Hoskins, RPR Shorthand Reporter Notary Public State of Florida at Large

* * *

[p. 3] THEREUPON,

KAREN JONES

was adduced as the deponent herein, and being first duly sworn upon oath, was questioned and testified as follows:

DIRECT EXAMINATION

BY MR. SHEEHAN:

Q. Would you state your name for the record.

A. Karen Lee Jones.

Q. And, Karen, where are you employed?

A. Ken Marks Ford.

Q. And what do you do there?

A. Personnel director.

Q. Can you tell me a little bit about you job as a personnel director.

A. I do payroll for about 250 employees, handle all the insurance, as far as signing them up for insurance, medical and dental, handling any paperwork for workmen's comp claims, different reports, schedules for dealer tags, vacations, Christmas bonus accounts for the salesmen, accounts receivable for the employees. Goodness.

Q. do you have anything to do with hiring

* * *

[p. 13] personnel director at that time?

A. That's right. And sometimes they do take them and take them back to the department and complete the paperwork and bring them back to me.

Q. Okay.

A. They don't sit in front of me and fill out the paperwork. Some do. Some don't.

Q. I understand. But you're familiar with the procedure?

A. Yes.

Q. As a matter of fact, you'd be the person that would really set the procedure?

A. No. Probably not.

Q. Who would set the procedure?

MR. FRAZIER: Wait a minute. Are you talking about when Mr. Hopkins was hired or when Ms. Jones –

MR. SHEEHAN: Let me withdraw that question and go back.

BY MR. SHEEHAN:

Q. Is the procedure that you use for hiring now the same as what you used when Mr. Hopkins was hired?

A. Yes.

[p. 14] Q. Okay. And do you have any responsibility for making sure that the procedure is uniformly followed?

A. Well, my responsibility is to make sure that the paperwork is completed and returned to me as – the same day, so that I can get them into the system to pay them.

Q. Okay. What – what paperwork do you – is required when somebody is hired? And when I ask you

this question, I'm referring specifically to the period of time when Mr. Hopkins was hired, with the assumption, based on your statement, that it's the same today; correct?

A. Yes.

Q. Okay.

A. It is the same.

Q. Okay.

A. We have a general information sheet that lists his name and address and home phone number, date of employment, the department, position, rate of salary, his driver's license number, the state it's issued by, date of birth, Social Security information and who to notify in case of emergency. That's all on form number one of the employee packet.

[p. 15] MR. SHEEHAN: Okay. Hang on just a minute. I'm just going to mark this as Exhibit No. 1.

BY MR. SHEEHAN:

Q. Is that –

A. No, that's not the form.

MR. SHEEHAN: Okay. Exhibit No.1 is out.

BY MR. SHEEHAN:

Q. So form number one is called what?

A. It's information sheet for the employee packet, form number one.

Q. Okay.

MR. FRAZIER: I'm sorry. Who fills that out?

THE DEPONENT: The employee fills this out.

BY MR. SHEEHAN:

Q. and that's just general information?

A. Uh-huh.

MR. SHEEHAN: Okay. Let's mark that information sheet as Exhibit No. 1.

BY MR. SHEEHAN:

Q. Could I take a look at that for a moment?

[p. 16] A. Uh-huh.

Q. Okay. Now, that information sheet, that is filled out after the employee is hired?

A. Yes.

Q. Okay. What other?

A. Okay. There's the U.S. Department of Justice form that I – that they complete and sign. I fill out section two and verify that they have given to me two forms of identification, one being normally and always a Florida driver's license, which they have to have, and a Social Security card or a certificate of birth or passport, some other form of identification.

And I certify that I've seen them within the first couple of days of their employment. And I sign that.

Q. I'm not familiar with the Department of Justice form. What's the purpose of that?

A. It's to – that they're eligible to work in the United States.

Q. Okay.

A. Their eligibility.

Q. Could I just take a quick look at that?

A. The first sheet is front and back, and [p. 17] it tells us what we can use for identification on the backside there.

Q. Okay. In your seminars that you've attended regarding the Americans with – never mind. I'll ask that later.

Tell me what the next form is.

A. Next I have the identification and preplacement questionnaire.

MR. FRAZIER: You're reading these forms off as they're listed in your file; you're not reading them off as necessarily they would be given to a potential employee?

THE DEPONENT: No. When they're given to the employee, they're – he's merely handed a file with about 16 pieces of paper in there for him to sign and acknowledge or read over, and they can be in any order. This is how I put them in order.

BY MR. SHEEHAN:

Q. Well, do you give it to them after they're hired?

A. Yes, after they're hired. The only thing that he's given upon interview is the application. And we ask for

the driver's license [p. 18] and Social Security card, to see that at the time of the interview.

Q. Okay. Do you have the application?

A. Uh-huh.

Q. Can I see it?

A. Uh-huh.

Q. Okay. So the employee is given the job application first?

A. Yes.

Q. And that's the only form he's given initially?

A. Yes, when he's being interviewed.

Q. Okay. Then after he is actually hired, he's given these others?

A. Yes. These are given after he's hired.

Q. Okay. Now, we've gone through the information sheet, the Department of Justice form, the identification and preplacement questionnaire. Anything else?

A. A copy of his Florida driver's license, which I do run a motor vehicle report on to make sure that it is current and that he has under a certain amount of points, that he is covered on our liability insurance, because he will be driving, in some cases, customer vehicles and [p. 19] company cars.

Q. Okay.

A. So he has to have a current driver's license that's valid. And he can have violations, but not an excessive

amount of violations. No DUIs. If he has two moving violations in a year, he can be removed from the insurance, can be uninsurable.

Next is some sort of identification that he shows us. Again, under the I-9 form, that he did show us. In this case, he didn't have a Social Security card, but he showed us that he did apply for one, so Joan took this as his identification, that he applied for Social Security.

We didn't get his original copy. Oh, she did get it. I take that back. She did get it after the fact.

Next is the motor vehicle report that I receive from general information services and a traffic violation, equipment damage. It states if you do any damage, you'll be held responsible, and he did sign that.

In the next folder we have payroll change notices, which shows that he was given a [p. 20] salary of $7 flat rate per hour on January 5th when he was hired. He had a rate of change on 1/26 of '94 to 8.50 an hour, and then again on 4/13/94 to $9 an hour. Those are by Bob Leis. He completes this. He gives it to me, and I put it into the payroll system.

Q. Are those promotions?

A. They are rate changes, not necessarily promotions, if it's the same job. But it can be the same job.

Q. Is it a rate change based on performance?

A. Yes, normally. This was specifically a merit increase based on performance.

Q. Okay.

A. He did check "merit increase."

And the application is next. His W4 form with exemptions. He claimed on and married, his exemptions. This is an acknowledgment that the employee signs acknowledging that he understands he is on a 90-day probationary period, that he will be suspended if he consumes any alcoholic beverages or gambling, and that he has to notify his immediate supervisor if he is going to be absent.

[p. 21] Time card policy, that they have to punch a time card so we can keep track of their hours; the company policy and safety rules. This is our right to know, hazardous substance and material form, cafeteria plan, which he did sign. That's for him to know that we're taking his health insurance off of his gross wages. He won't be taxed on that amount, so he's only taxed less the health insurance.

And the coffee fund, he did not wish to participate in the coffee fund. And, last, the uniform request, requesting his uniform and saying that he does understand there will an payroll deduction for the uniform.

Q. Okay. Let me see if I can cut to the chase here. In any of the forms that you – that you have the employee fill out, do you inquire about his physical condition?

A. On the form, the identification and preplacement questionnaire, that does ask if you've ever received any workers' compensation or disability benefits, if you've ever injured or sprained your back or received treatment from a doctor, or do you have – or have you had any

physical disability or impairment. That's asked [p. 22] on this form.

And then it asks you if you have any eye trouble, hearing trouble, heart trouble.

Q. Okay. Any other forms that ask about the employee's physical condition and the past –

A No.

Q. – medical history?

A. No. The only other question would be on the application: Are you qualified to do the job for which you are applying? That's the only other question.

Q. Okay. And what you're saying is that this form, the identification and preplacement questionnaire, that is given to the employee after he's hired?

A. Yes.

Q. Okay. So in your opinion, that meets the requirements of the ADA?

MR. FRAZIER: I'm going to object to asking her for an opinion on that. She is obviously not a legal expert on that.

MR. SHEEHAN: I understand.

BY MR. SHEEHAN:

Q. But to the extent that you do provide advice to the company with regard to that, and [p. 23] you do go to seminars regarding that, is that the reason that it's done that way in the company?

A. Well, the forms have changed. As you know, last year we went to the special disabilities, where we can use that form to go into the fund if anyone has a disability, and that is a new form.

We didn't have that at the time, but if we have the information, we would know that when they have an injury, if they're injured on the job, we have the fund that we can go to.

MR. SHEEHAN: Well, I don't know if that answers my question. I'll withdraw that.

BY MR. SHEEHAN:

Q. Do you require employees to have physical examinations?

A. No.

Q. And did you require Mr. Hopkins to have a physical examination?

A. No.

Q. If an employee has a particular problem, for instance, they say "yes" to one of these questions, what is the procedure that you follow?

* * *

APPENDIX 6

[p. 1] STATE OF FLORIDA
DEPARTMENT OF LABOR
AND EMPLOYMENT SECURITY
DIVISION OF WORKERS' COMPENSATION

EMPLOYEE:	JEFFREY B. HOPKINS
EMPLOYER:	KEN MARKS FORD
CARRIER:	PCA SOLUTIONS
CLAIM NO.:	350-52-8028
D/A:	12/21/94

DEPOSITION OF: ROBERT LEIS

TAKEN BY:	Attorney for Employee/Claimant
DATE:	Thursday, October 26, 1995
TIME:	Commencing at 2:42 p.m.
PLACE:	Executive Reporting service 200 Central Avenue Suite 400 St. Petersburg, Florida
REPORTED BY:	Mary Ward Hoskins, RPR Shorthand Reporter Notary Public State of Florida at Large

* * *

[p. 3] THEREUPON,

ROBERT LEIS

was adduced as the deponent herein, and being first duly sworn upon oath, was questioned and testified as follows:

DIRECT EXAMINATION

BY MR. SHEEHAN:

Q. Would you state your name for the record, please.

A. Robert Leis, L-E-I-S.

Q. And, Mr. Leis, you're employed at Ken Marks Ford; is that correct?

A. Yes.

Q. And what's your position there?

A. Body shop director.

Q. How long have you been body shop director?

A. Eight-and-a-half years. I've been with the company over nine.

Q. How many employees do you have under you?

A. Thirteen, fourteen.

Q. And you do the – you do the hiring and the firing of the employees in the body shop?

A. Yes.

[p. 4] Q. Okay. Now, Jeffrey Hopkins, did he work for you?

A. Yes.

Q. So you would be the person who hired him?

A. Correct.

Q. Okay. And you would be the person who would fire him?

A. Correct.

Q. What is his employment status right now?

A. If he came back with a doctor's order to work, he would certainly be able to start working again.

Q. Okay. So as far as you know, he's still an active employee?

A. Right. The last time I heard of him or that I've talked to him was in January of '94 –

Q. What was his –

A. – '95, I guess. Yeah.

Q. He had an accident in December of '94; correct?

A. Yes. Yeah.

Q. Has he worked since that accident?

A. No. Not for me, no.

[p. 5] Q. Prior to the accident, he worked for you for approximately 12 months?

A. Eleven months. He was almost to his anniversary. I think he started January 5th.

Q. Okay. And you stated that, you know, if he was physically released by the doctor, you would take him back; is that correct?

A. Oh, yes.

Q. Does that lead us to conclude that he was a good employee for the 11 months he worked there?

A. Yeah. I had really no major complaints.

Q. What did he do as an employee?

A. He was a painter's assistant and helper.

Q. Can you tell me what a painter's assistant and helper does.

A. Okay. He tapes, sands, removes moldings. He was also hired – we had a recall program with the Ford Motor Company that the factory was repainting trucks, and that was one of the main reasons he was hired at that time, that I needed somebody.

And what the job entailed, which I told

* * *

APPENDIX 7

DISTRICT COURT OF APPEAL, FIRST DISTRICT

Tallahassee, Florida 32399-1850

Telephone (904) 488-6151

DATE: November 7, 1996

CASE NO.: 95-4502

JEFFREY B. HOPKINS
Appellant.

vs.

KEN MARKS FORD and PCA SOLUTIONS, INC.
Appellees.

(Filed Nov. 12, 1996)

BY ORDER OF THE COURT:

Appellant is hereby directed to file within ten (10) days a supplemental brief addressing whether Appellant's claim under the Americans with Disabilities Act (ADA) should have been raised before the judge of compensation claims (JCC) to make a record of the alleged ADA violation and preserve that issue for appeal, irrespective of any contention that the JCC may not have had jurisdiction to dispose of the issue. Appellees may serve an answer brief within five (5) days thereafter.

I HEREBY CERTIFY that the foregoing is a true copy of the original court order.
[SEAL]

/s/ Jon S. Wheeler
JON S. WHEELER, CLERK

By: Angie Johnston
Deputy Clerk

Copies:
James A. Sheehan
Gary E. Frazier

APPENDIX 8

IN THE DISTRICT COURT OF APPEAL, FIRST DISTRICT
TALLAHASSEE, FLORIDA

JEFFERY B. HOPKINS,

Appellant,

KEN MARKS FORD, INC. and PCA SOLUTIONS, INC.

Appellee.

_____/

CASE NO.: 95-04502
Claim No: 350-52-8028
D/A: 12/21/94

APPELLANTS SUPPLEMENTAL BRIEF

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QUESTION PRESENTED 1

WHETHER APPELLANT'S CLAIM UNDER THE AMERICANS WITH DISABILITIES ACT SHOULD HAVE BEEN RAISED BEFORE THE JUDGE OF COMPENSATION CLAIMS TO MAKE A RECORD OF THE ALLEGED ADA VIOLATION AND PRESERVE THAT ISSUE FOR APPEAL

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Smith v. Piezo Technology and Professional Administrators 427 So.2d 182 (Fla. 1983) 2

QUESTION PRESENTED

The issue this court has asked the parties to brief is "whether Appellant's claim under the Americans with Disabilities Act (ADA) should have been raised before the Judge of Compensation Claims (JCC) to make a record of the alleged ADA violation and preserve that issue for appeal . . . "

ARGUMENT

The undersigned would initially point out to this court that Mr. Hopkins was not making a claim under the ADA. Mr. Hopkins was making a claim for workers' compensation benefits. The employer-carrier was asserting misrepresentation as an affirmative defense to that claim for compensation benefits. The question really is whether the claimant was required to avoid the employers affirmative defense to his claim for workers' compensation benefits by alleging that the ADA has preempted that defense.

This procedural distinction is very important. *Sasso v. Ram Property Management,* 431 So.2d 204 (Fla. 1st DCA 1983) approved 452 So.2d 932 (Fla. 1984) and other cases cited herein involved a claim for increased benefits based on the unconstitutionality of the Workers' Compensation Act. In this case, the JCC could have awarded all benefits requested without even considering the constitutional issue; that is, simply by finding that the evidence did not support a misrepresentation defense. *Sasso* indicates that Appellant could not have had standing to raise the constitutional issue until benefits were denied; *Sasso* at 208, " . . . noone can urge the unconstitutionality of a worker's

compensation act who is not injuriously affected by the feature complained of." See also *Acosta v. Kraco* 426 So.2d 1120 (Fla. 1st DCA 1983): U.S. Cert. denied 474 U.S. 1022, 106 S.Ct. 576; *Robbins v. Rophie Shoes, Inc.*, 413 So.2d 839 (Fla. 1st DCA 1982) and *Jack Eckerd Corp. v. Coker* 411 So.2d 1026 (Fla. 1st DCA 1982).[1]

Thus, Appellant only obtained standing to raise the constitutionality of 440.15(5)(a), the codification of the misrepresentation defense in Florida, *when the court entered an order* finding that the evidence supported a misrepresentation defense and denying benefits as a result. The trial in the lower court of the claim for compensation benefits and the denial of benefits based on the misrepresentation defense created the issue for this court to decide.

However, even if this court overlooks the standing issue, it would still have to find that the claimant did not have to raise the preemption issue in the lower court.

It has consistently been the position of the Florida courts that the powers of the JCC are administrative, not judicial, and that the JCC does not have the authority to decide constitutional issues; see *Radney v. Edwards*, 424 So.2d 956 (Fla. 1st DCA 1983); *Continental Casualty company v. Hartford Accident and Indemnity Co.* 151 Fla 742, 10 So.2d 440 (En Banc, 1942); and *Smith v. Piezo Technology*

---

[1] The above cases also indicate that if the JCC ruled that the misrepresentation defense was preempted by the ADA and therefore could not be considered, then there might be no record to determine that the claimant misrepresented his physical condition. The Appellees then would have been prejudiced if they wanted to appeal.

and Professional Administrators 427 So.2d 182 (Fla. 1983). The appropriate procedure is to create a record for appellate purposes and raise the issue on appeal; *Sasso v. Ram Property Management,* 431 So.2d 204 approved 452 So.2d 932 (1984); *B&B Steel Erectors v. Burnsed* 591 So.2d 644 (Fla 1st DCA 1984); and *Key Haven Associated Enterprises Inc. v. Board of Trustees* 400 So.2d 66 (Fla. 1st DCA 66); rev'd in part and aff'd in part 427 So.2d 153 (Fla. 1982).

In *Sasso* the parties did not raise or attempt to litigate the constitutionality of Florida Statute 440.15(3)(b) 3d before the JCC. The court said that it was permissible to raise the issue on appeal for the first time because the JCC did not have the authority to hear the issue and therefore, raising it would be futile; *Sasso* at 207. However, the court went on to say that "an insufficient record might negate the possibility of Appellate review"; *Sasso,* at 208.

This court *may* for some reason be making a distinction between *Sasso* and the present case because *Sasso* involved the claim that a section of the Workers' Compensation Act (440.15(3)(b)3d) was unconstitutional and this case involves the claim that a section of the Workers' Compensation Act (440.15(5)(a)) is preempted by the ADA. However, there really is no distinction because if there is a conflict between the ADA and the Workers' Compensation Act, then there is a constitutional violation under the supremacy clause because the ADA has preempted state workers' compensation laws in conflict with it; *Barry v. Burdines* 667 So.2d 241 (Fla. 1st DCA 1995), affirmed 21 FLW S247 (Fla. 1996); *O'Neill v. Department of Transportation* 442 So.2d 961 affirmed 468 So.2d 904 (Fla.

1985) and *Acosta v. Kraco, Inc.* 448 So.2d 562 (Fla 1st DCA 1984) affirmed 471 So.2d 24 (Fla 1985).

Even if there is some distinction between this case and *Sasso,* the reasoning of *Sasso* should apply: since the JCC does not have the power to decide the issue, the claimant is not required to do a futile thing. The only relevant inquiry is whether there is sufficient evidence in the record for this court to decide the issue. This court in *Berry* noted that the JCC did not have the power to entertain the precise issue of whether the ADA pre-empted a specific section of the Workers' Compensation Act. The only question was whether the record was sufficiently developed for appellate purposes:

> "Although the judge could not invalidate the statute, the record was sufficiently developed to permit consideration of the issue on appeal."
>
> *Barry v. Burdines,* 667 So.2d 241 (Fla 1st DCA, 1995) p. 241, note 1.

A sufficient record was made in this case to determine whether Fla. Statutes 440.15(5)(a), the codification of "*Martin v. Carpenter* 132 So.2d 400 was pre-empted by the ADA.

In order to evaluate the preemption issue, this court would need to know obviously the questions that were asked by the employer, the circumstances under which they were asked, and the employer's policies and procedures. Peripherally the court would need to know if this employee was covered under the ADA. All this information is in the record. Without rearguing the case, Appellant would point out that the depositions of Karen Jones and Robert Leis were taken prior to Trial (R

194-252) and every aspect of the employer's procedure for hiring was discussed. Ms. Jones was specifically asked about her knowledge of the ADA (R 197, L16 - R 198, L8) and whether she felt the hiring procedures complied with the ADA (R 215, L 12 - R 216, 114). Every question the undersigned could possibly think of about the company's policies and procedures in general and as they applied to the hiring of Mr. Hopkins was asked during those two depositions. The record establishes that Ken Marks Ford has 250 employees (R196). The employment questionnaire is in evidence (R190 - 192). In short, Appellant can think of no facts relevant to this issue that are not in the record.

The only reasons the undersigned can think of to support raising the ADA issue in the lower court would be:

1. To allow the JCC to address the issue;

2. To allow the Appellee possibly to create a record in opposition to the claim.

Appellant has already pointed out that there is no reason to allow the JCC to address the issue because she did not have jurisdiction to decide the question. Additionally, if the JCC had stepped in and decided that the ADA precluded the application of the misrepresentation defense, the *Appellee* might not have a record for appellate purposes.

Second, the Employer/Carrier introduced the issue and the evidence that created the constitutional question. An essential part of the Employer/Carrier's misrepresentation defense were the questions asked in the Identification and Pre Placement Questionnaire and the answers given. It was this evidence which violated the ADA.

CONCLUSION

For the reasons expressed herein, this court should find that the Appellant did not have to raise the issue whether the ADA by operation of the Supremacy Clause does preempt 440.15(5)(a) in the lower court. Specifically this court should find:

1. The claimant did not have standing to raise the constitutional issue until the court denied benefits based on the misrepresentation defense;

2. Even if the claimant could have raised the issue, he was not required to under *Sasso* because the court did not have jurisdiction to hear it; and

3. By litigating the claim for benefits including the misrepresentation defense, the claimant and the Employer/Carrier created the appropriate record for this court to decide the preemption issue.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Appellant's Reply Brief has been furnished to: GARY E. FRAZIER, ESQUIRE, 100 Second Avenue South, Suite 400-N, St. Petersburg, FL 33701 this 14 day of November, 1996.

/s/ James A. Sheehan
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(2)

Supreme Court, U.S.
FILED
NOV 18 1997
CLERK

No. 97-535

In The

Supreme Court of the United States

October Term, 1997

JEFFREY B. HOPKINS,

Petitioner,

vs.

KEN MARKS FORD and PCA SOLUTIONS, INC.,

Respondents.

On Petition for a Writ of Certiorari to the First District Court of Appeal of the State of Florida

RESPONDENTS' BRIEF IN OPPOSITION

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22 pp

QUESTION PRESENTED

Can an employer properly rely on a statutorily mandated false representation defense to a workers' compensation claim, where the employee presented fraudulent written information regarding physical condition, prior injuries, and current disabled status in response to employer's inquiries about such, and where such employer inquiries may or may not have been in compliance with the Americans With Disabilities Act?

PARTIES TO THE PROCEEDING

The following is the parent corporation of Respondent Ken Marks Ford, Inc.: Sonic Automotive, Inc. There are no nonwholly owned subsidiaries of Ken Marks Ford, Inc. Respondent PCA Solutions, Inc., is now known as Humana Workers' Compensation Services, Inc., whose parent company is Humana, Inc. There are no nonwholly owned subsidiaries of Humana Workers' Compensation Services, Inc.

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Fla. Stat. § 440.15(5)(a)	*passim*

JURISDICTIONAL ISSUES

Petitioner asserts that this Court has jurisdiction to review this case because the decision of the Florida District Court of Appeal, First District, conflicts with the decision of the Minnesota Supreme Court in *Huisenga v. Opus Corp.*, 494 N.W. 2d 469 (Minn. 1992) with the implication that these are conflicting state court decisions that have decided an important federal question. This is incorrect. Neither the pending Florida decision nor the Minnesota decision has decided an important federal question. The Minnesota decision in *Huisenga* involves an interpretation of the Minnesota Human Rights Act.

Moreover, the Petitioner asserts that this Court has jurisdiction to review because the decision of the Florida District Court of Appeal, First District, conflicts with a decision of the United States Court of Appeals, First Circuit in *Grenier v. Cyanamid Plastics, Inc.*, 70 F.3d 667 (1st Cir. 1995). That is an incorrect statement. There is no conflict between these decisions.

Finally, the Petitioner asserts that this Court has jurisdiction to review because the decision of the Florida court affects an important question of federal law. However, the purported important question of federal law framed by the Petitioner has no basis in the facts of this case as the Petitioner's workers' compensation benefits were not denied because of the results from an employer inquiry into his medical history, but rather his benefits were denied because of his intentional, fraudulent misrepresentations. Furthermore, the Florida statute in issue makes no reference to enabling an employer to make an inquiry into an employee's medical history, whether lawfully or otherwise.

STATUTORY PROVISIONS INVOLVED

Respondent includes the following additional statutory provisions:

The Americans with Disabilities Act, Title I, 42 U.S.C. § 12111 provides, in pertinent part:

> (5) Employer. (A) In general. The term "employer" means a person engaged in an industry affecting commerce who has 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year, and any agent of such person, except that, for two years following the effective date of this title, an employer means a person engaged in an industry affecting commerce who has 25 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding year, and any agent of such person.
>
> (8) Qualified individual with a disability. The term "qualified individual with a disability" means an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires. For the purposes of this title, consideration shall be given to the employer's judgment as to what functions of a job are essential, and if an employer has prepared a written description before advertising or interviewing applicants for the job, this description shall be considered evidence of the essential functions of the job.

REASONS FOR DENYING THE WRIT

1. Petitioner has failed to raise the issue now presented before this Court in the trial court below. As a result, Petitioner has absolutely failed to preserve the issue or to establish any form of relevant record activity sufficient for purposes of appellate consideration or review of the issue.

The Petitioner demonstrates his perception of a supposed conflict between the Americans With Disabilities Act (ADA) and Fla. Stat. § 440.15(5)(a) (Supp. 1994) in the following issue statement excerpt as presented in the Petitioner's Amended Reply Brief before the Florida District Court of Appeal, First District, as follows:

> Can an employer, pursuant to state law, deny a workers' compensation claim based on the employee's misrepresentation of the existence of a disability on an employment questionnaire, when the ADA precludes the employer from asking the questions to the employee concerning his disability.

Petitioner poses this conflict in an attempt to demonstrate a potential statutory imposition mandating preemption of the Florida statute by the superior federal legislation.

It is clear from the record, however that Petitioner simply never raised any such issue at the trial level. At no time did the Petitioner or the Employer/Carrier present evidence or argument as to why or why not the ADA was applicable to this case. There is no record evidence suggesting whether or not the questions posed by the Employer to Petitioner ever ran afoul of the ADA, invoking its protections, or whether the Employer's questions may have been otherwise justified under a legitimate business purpose pursuant to 42 U.S.C. § 12112(d)(4).

There is also no record evidence demonstrating that Petitioner is properly classified as a "qualified individual" for purposes of invoking ADA protections, pursuant to 42 U.S.C. § 12111(8). Failure to generate record evidence of entitlement to ADA protections as a "qualified individual" pursuant to the definition in 42 U.S.C. § 12111(8) precludes such individual from asserting ADA protections. *Hensley v. Punta Gorda*, 686 So. 2d 724, 726 (Fla. 1st DCA 1997). A "qualified individual" is:

> an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires.

42 U.S.C. § 12111(8).

The *Hensley* Court clearly stated that if an ADA claimant cannot perform the essential functions of the job, such Claimant is not entitled to protection of the ADA. *Hensley*, 686 So. 2d at 726. The court explained that disability under the Florida worker's compensation law presupposes that a claimant is unable, by reason of her injuries, to successfully perform all of the functions of her job. *Id.* The court further reasoned that the fact that appellant was consequently seeking disability benefits plainly excluded her from the definition of "qualified individual". *Id.*

Petitioner clearly misrepresented his ability to perform the job supplied to him. As a result of heavy lifting, as required by Petitioner's position, Petitioner was injured and attempted to claim disability benefits. Under a *Hensley* analysis, Petitioner is thus presumed to have been unqualified for the job which caused further injuries to his preexisting disability, and Petitioner has put forth no evidence on the record to rebut such

presumption, nor has Petitioner ever asserted that he would come within the scope of the definition of "qualified individual" for purposes of ADA protections.

Petitioner's suggestion that the Employer has already taken the position that Petitioner was a "qualified individual" for ADA purposes (*see* Petition at pg. 13) has no merit or basis in law or fact. As a foundation for this misguided assumption, Petitioner attempts to rely upon Employer's statement that, had it known Petitioner were disabled, it would have attempted to accommodate him. (*see* Petition at pg. 13). This statement by Employer does not prove Employer's recognition of Petitioner as a disabled and qualified individual in any way, but rather only demonstrates that, had Petitioner truthfully and properly informed Employer of his disability, and had Employer had the opportunity to recognize Petitioner as disabled, Employer would have attempted to accommodate him in accordance with the law.

Furthermore, no evidence or argument was put forth as to why or why not Fla. Stat. § 440.15(5)(a) was or was not contrary to and preempted by the ADA under the facts of this case. While the Petitioner is correct that the judge of compensation claims (JCC) would not have had the authority to invalidate the state statute, Petitioner should have raised the preemption issue at trial for purposes of preliminary determination of whether the ADA was applicable as well as whether Fla. Stat. § 440.15(5)(a) was inconsistent with the ADA so as to necessitate preemption in this particular case. If this proper procedure had been followed, the record would have been appropriately developed for purposes of appeal and review, where this Court could possibly have addressed the trial court's treatment of the statutory issues as well as any potential constitutional questions arising from such treatment. In the matter at hand, however, the record is essentially a blank slate, simply void of the various sorts of evidence necessary for a proper consideration of the issue presented by Petitioner.

Additionally, it is well established that Petitioner's failure to raise the issue now before the court in the trial court below properly functions to bar such issue from further consideration on appeal or review. Failure to properly preserve an issue in the trial court below is fatal to any further attempt at review of such issue. *Sunland Hospital/State of Florida v. Garrett*, 415 So. 2d 783 (Fla. 1st DCA 1982). *See also Oakley v. East Lake Drywall*, 641 So. 2d 515 (Fla. 3rd DCA 1994) (holding that claimant's failure to raise an issue of application of a workers' compensation statute before the judge of compensation claims was therefore not properly raised for the first time on appeal.)

Florida courts do, however, recognize a very narrow exception to the *Sunland* rule requiring preservation of issues for review purposes. In order to qualify for avoidance of the preservation requirement, the issue raised on appeal must involve the facial constitutionality of the statute in question. *Sasso v. Ram Property Management*, 431 So. 2d 204 (Fla. 1st DCA 1983). The issue raised on appeal must be strictly constitutional in nature, not a creature of statutory interpretation. *Id.* at 207. The *Sasso* court further limited its exception to *Sunland* by requiring that any issue demonstrating the facial unconstitutionality of a section of workers' compensation law and utilizing the appellate court as a court of first resort must be shown to be actually ripe for adjudication. *Id.* at 208.

It is upon *Sasso* which Petitioner relies in pursuing review of the unpreserved issue now before this Court, yet at no time has Petitioner demonstrated that Florida workers' compensation statute § 440.15(5)(a) is the type of facially unconstitutional statute contemplated by the *Sasso* court, nor has the issue as presented before this Court been properly generated by the facts in the case at hand to justify a determination of its ripeness for review, as will be discussed in the paragraphs below. Additionally, the *Sasso* court, while permitting some issues to

technically be presented for the first time on appeal, clearly recognized that failure to raise an issue in the court below would most likely result in an insufficient record, thus barring review of the issue in any case. *Sasso*, 204 So. 2d at 208. In fact, the Florida District Court of Appeal, First District, specifically cited *Sasso v. Ram Property Management* in its per curiam citation decision denying Petitioner's appeal and affirming the holding of the trial court below.

Clearly, Petitioner has never properly preserved the issue now before this Court for purposes of further appellate consideration or review as required by Florida law. Petitioner's attempt to raise such issue for the first time in the Florida appellate court was a fatal procedural impropriety, effectively barring further consideration under these circumstances, and resulting in failure to generate a record in the court below suitable for review of such issue in any case. Furthermore, Petitioner has not demonstrated that the Florida statute in question is facially unconstitutional in nature, and has thus failed to satisfy the narrow exception to mandatory preservation of issues which would otherwise have made such procedure appropriate.

Petitioner has alternatively suggested on page 12 of his petition to this Court that it was, in fact, the Employer who raised the ADA issue at hand by stating that Petitioner misrepresented his physical condition at the time of employment. This suggestion is completely unfounded, for there is no basis in law demonstrating that an employer's assertion of a misrepresentation defense to an injured workers' demand for undeserved workers compensation benefits automatically functions to trigger an application of the provisions of the ADA.

2. Even if this Court determines that there are in fact sufficient materials before the court to permit a proper and

thorough review, and decides to overlook Petitioner's blatant procedural improprieties which would otherwise bar further consideration of the issue, a careful reading of the federal question of law posed by Petitioner, after a thorough review of the record facts in the matter, will clearly demonstrate that no such federal question has been generated by the facts in the matter at hand, or from litigation of the matter in the courts below. The facts in this case simply do not warrant nor do they support a discussion of the issue Petitioner has presented to this Court. The first portion of Petitioner's improperly posed federal question is as follows:

> Whether the Americans with Disabilities Act prevents employers from inquiring into an employee's medical history and using the results of the inquiry to deny the employee worker's compensation benefits.

The case before us, however, is not a situation in which the Petitioner responded to questions set forth in a job application process, and Employer, based upon Petitioner's truthful answers, attempted to deny Petitioner worker's compensation benefits discriminatorily as a result of his admittedly disabled status, in contravention with ADA regulations. This is the factual scenario that would lead to a proper formation of the issue presented by the Petitioner. Rather, the case before us is one in which Petitioner took it upon himself to intentionally provide fraudulent information concerning his physical condition and ability to perform work to his Employer, and Petitioner's own false statements functioned to exclude him from worker's compensation benefits by triggering the Florida statutory safeguard against written fraudulent misrepresentation during the employee placement process, Fla. Stat. § 440.15(5)(a). Petitioner addresses the appropriateness of this state statute in the second portion of his improperly posed federal question to this Court as follows:

> . . . and whether the Americans With Disabilities Act prevents a state from passing a law allowing the employer to make such an inquiry. (The phrase "such an inquiry" refers to the questions employer asked of Petitioner regarding his health and prior injury history as part its routine pre-placement activities).

Again, Petitioner's question is simply not demonstrative of the factual occurrences established in the case at hand, or of the provisions of the state statute in question, or of the actions of the Employer. Clearly, no portion of the language comprising Fla. Stat. § 440.15(5)(a) expressly or impliedly permits an employer to make inappropriate or illegal inquiries into job applicants' or employees' prior injuries or disabled status, as Petitioner's question would suggest. In fact, there is simply no language whatsoever that in any way determines what sorts of inquiries may or must be made, or when, or what sorts of inquiries are or are not appropriate. Plainly, the Florida Legislature was aware of the ADA at the time of the drafting of current Fla. Stat. § 440.15(5)(a), *circa* 1994, and would not have prepared the language in a manner that would run afoul of the provisions of a federal regulatory scheme, directly or otherwise. Petitioner simply cannot demonstrate that the Florida Legislature has drafted a statute that, as Petitioner's question to this Court suggests, "allows" employers to make illegal inquiries in contravention with the provisions of the ADA.

The Petitioner's core question as to Fla. Stat. § 440.15(5)(a) (*see* Petition at pg. 13) is:

> whether such statute, as interpreted by the Florida courts, causes prejudicial treatment to disabled persons or those perceived as disabled and operates to prevent such persons from competing in the work place, generating an artificial, arbitrary, and unnecessary barrier to employment.

In fact, § 440.15(5)(a) is entirely incapable of being either discriminatory or prejudicial in its operation, but rather precludes *all* fraudulent statements, from disabled *or* non-disabled persons, in the course of the employment application process. In the matter at hand, the results of inquiries made by the Employer of the Petitioner, after his hiring, were simply not used in a discriminatory fashion, as contemplated by the ADA, to bar the Petitioner from rightfully deserved workers' compensation. In fact, any form of *truthful* answer, either yea or nay, to the Employer's questions would not have resulted in barring Petitioner from disability benefits. Here, the Petitioner was denied workers' compensation as a result of his own fraudulent, intentional misrepresentations to his Employer, and was thereby injured by his dishonesty, not his disabilities or any truthful admission or representation thereof to his Employer. It was not the substance of his answers, but rather their fraudulent nature, that resulted in Petitioner's denial of benefits. In fact, as a result of Petitioner's misrepresentations, the Employer was not even aware of Petitioner's disabilities at the time of his job placement determination, and could therefore not have acted prejudicially based upon such unpossessed knowledge.

Furthermore, nothing in the Americans With Disabilities Act expressly precludes or prohibits states from formulating statutes in an effort to shield employers from the results of fraudulent representations set forth by an employee in contemplation of securing or maintaining employment or insurance benefits, nor should the ADA be utilized as a tool to substantiate or excuse such fraudulent misrepresentations during the formation of an employment contract, effectively resulting in a reward for such illegal conduct.

It is well established that the ADA prevents employers from improperly obtaining an employee's or job applicant's health information, and utilizing such information concerning the

individual's disabilities in a prejudicial manner to the individual's detriment. It is equally established that Fla. Stat. § 440.15(5)(a) merely functions to prohibit employees and job applicants from submitting fraudulent written statements to an employer to the effect of fraudulently maintaining or establishing workers compensation benefits to which such individuals are not properly entitled.

The express provisions and intended applications of these statutes plainly are not mutually exclusive, neither are they in direct functional conflict as the Petitioner would suggest. Although the phraseology of Petitioner's stated question does in fact demonstrate a hypothetical conflict, neither the language of the statutes nor the fact scenario in the case at hand permits such a formulation for consideration. Petitioner's suggested conflict is utterly baseless and wholly fabricated by his inaccurate formulation of the issue as Petitioner has presented it.

3. Petitioner has undeniably failed to preserve an ADA-related issue for purposes of appeal or review, failed to establish a sufficient record for review in the court proceedings below, and failed to present before this Court accurately constructed, logically derived, factually supported issues ripe for review. This Court may, however, in its wisdom and graciousness, decide to rephrase, reconstruct, or redesign the issue before it as one reasonably derived from the facts of this case. If this Court does, in fact, decide to stretch its discretionary powers of review in such a manner, Respondent urges that the Court adopt the following, accurate construction of the occurrences in this matter:

> Can an employer properly rely on a statutorily mandated false representation defense to a workers' compensation claim, where the employee presented

> fraudulent written information regarding physical condition, prior injuries, and current disabled status in response to employer's inquiries about such, and where such employer inquiries may or may not have been in compliance with the Americans With Disabilities Act.

If it does in fact please the Court to adopt this proper demonstration of statutory interaction based on the facts of the case at hand, and to consider a review of such issue in light of Petitioner's suggestion that the situation before the Court requires federal preemption of Florida misrepresentation defense statute § 440.15(5)(a), then it is the duty of Respondent to bring to the attention of this Court the case of *Caldwell v. Aarlin/ Holcombe Armature Company*, 481 S.E. 2d 196 (Ga. 1997), which Petitioner has failed to discuss.

In *Caldwell*, the Georgia Supreme Court has already decided essentially the same issue generated by the facts of this case as articulated clearly and correctly above, holding that an employer could in fact rely on a false representation defense to a workers' compensation claim, even if the questions that the employer posed violated ADA provisions prohibiting *pre-offer* inquiries and examinations regarding disabilities. *Id.*

In *Caldwell*, the claimant/appellant completed a job application form containing several questions about his general health, including the question "[h]ave you ever been treated for back problems?" Claimant answered "no", despite the fact that he had injured his back severely at a prior job and had received disability and medical benefits for the injury. The claimant subsequently injured his back again in the course of performing at his new job, and again demanded workers' compensation. The employer, who had relied upon claimant's statements to hire and place claimant, asserted the *Rycroft* false representation

defense to his workers' compensation claim (Georgia's *Rycroft* defense being the equivalent to Florida's *Martin v. Carpenter* misrepresentation defense to employees' and job applicants' false representations, now codified at Fla. Stat. § 440.15(5)(a) and serving as the subject of this controversy). *See Georgia Electric Co. v. Rycroft*, 378 S.E. 2d 111 (Ga. 1989); *Martin Company v. Carpenter*, 132 So. 2d 400 (Fla. 1961).

The *Caldwell* court upheld the *Rycroft* defense as being consistent with public policy, promoting truthfulness in the employment process and upholding laws voiding contracts procured by and through fraud. *Caldwell*, 481 S.E. 2d at 197. The court noted that the defense was consistent with the requirements of the Georgia Subsequent Injury Trust Fund (the equivalent of Florida's own Special Disability Trust Fund), which allows employers with knowledge of a worker's disability to access the fund, thereby encouraging the employment of disabled persons by protecting employers from excess liability when a worker's injury merges with a preexisting permanent impairment. *Id.*

The *Caldwell* court further determined that the *Rycroft* misrepresentation defense to workers' compensation claims was not in conflict with, nor should it be preempted by, the ADA. *Id.* at 196-9. The court explained that, under the *Rycroft* defense, an employer is not required to utilize any particular type of job application in order to assert the defense, and that the ADA does, in fact, expressly permit covered employers to make inquiries into applicants' or employees' abilities. *Id.* at 197. The court reasoned that such inquiries into the employee's or applicant's abilities or physical condition do not automatically violate the ADA, and thus a *Rycroft*-type defense may thus properly arise in instances where a job applicant misrepresents his physical abilities, despite the provisions of the ADA. *Id.* at 198.

The *Caldwell* court pointed out, as a further demonstration of the *Rycroft* defense's harmonious existence with ADA regulations, that such defense functions as a completely independent employer protection, extending to all employers and all varieties of job application processes, whereas ADA protections, much more narrow in scope and application, only arise in factual situations involving "covered employees", defined by 42 U.S.C. § 12111(5), as to specifically prohibited types of questions, directed toward "qualified individuals", and resulting in the prejudicial manipulation or application of such information to the detriment of the "qualified individual". *Id. See also* 42 U.S.C. § 12111, 12112.

In further support of its holding, the *Caldwell* court reasoned that the ADA already adequately

> provides avenues individuals can pursue when an employer violates the ADA provisions on . . . inquiries and examinations. Misrepresenting the truth on an improper job application is not one of the avenues provided by the ADA and the ADA does not authorize or countenance the use of knowing and wilful misrepresentations by employees in response to improper questioning by an employer.

Caldwell, 481 S.E. 2d at 198.

The court further explained that denying the employer the use of the *Rycroft* defense did not "reward" the employer for its use of improper job application questions or shield it from possible ADA penalties, yet disabling the *Rycroft* defense would function as a "reward" to the claimant for his intentional misrepresentations which led to his ill-gotten employment and subsequent re-injury. *Id.* Such an inappropriate "reward" can only lead to the proliferation or encouraged utilization of

fraudulent statements in the job application process, a wholly unsuitable result.

Respondent urges that this Court recognize the fair, logical reasoning and resulting holding of the *Caldwell* court to be good law, and that, in light of such holding, this Court recognize the absence of a true conflict warranting the preemption of Fla. Stat. § 440.15(5)(a) by the ADA. This Court has itself stated that, under the supremacy clause, state law can be preempted by federal law in three ways: when Congress in express terms states that federal law supersedes relevant state law; where federal law implicitly preempts state law because the scheme of federal regulation is sufficiently comprehensive to make reasonable inference that Congress left no room for supplementary state regulation; and even when federal law does not entirely occupy an area of law, state law is preempted to the extent that it actually conflicts with federal law, making compliance with both laws a physical impossibility, or demonstrating the state la as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. *Hillsborough County v. Automated Medical Laboratories, Inc.*, 471 U.S. 707, 713 (1985).

In light of the plain language, legislative history, legislative intent, and actual practiced application of both the ADA and Fla. Stat. § 440.15(5)(a), it is the Respondent's contention that even the properly reconstructed rendition of Petitioner's issue simply has not demonstrated the type of legislative conflict or incompatible statutory interaction contemplated by this Court to warrant preemption of the state statute, as demonstrated by the holding in *Caldwell*.

Petitioner cites a Minnesota case, *Huisenga v. Opus Corp.*, 494 N.W. 2d 469 (Minn. 1992) as supposedly persuasive authority for his position encouraging preemption of the Florida

statute by the ADA. This case, however is easily distinguished on the law and facts, and is technically, fatally off-point. The *Huisenga* court only addressed the issue of whether a false representation defense to a workers' compensation claim violated the Minnesota Human Rights Act (MHRA), which prohibits all forms of pre-employment inquiries into a job applicant's disabilities. The *Huisenga* court entirely failed to address the ADA, but rather indulged in a Title VII federal anti-discrimination analysis/comparison incorporating discussion of bona fide occupational qualifications. Furthermore, *Huisenga* arose from pre-employment inquiries made to a job applicant, which are absolutely prohibited by the MHRA due to the vast potential for prejudicial treatment of such information by employers, whereas the case at hand deals only with post-employment placement questions to an already hired employee, a situation much less ripe for the potentially prejudicial manipulation of information concerning employee disabilities. Additionally, such post-employment inquiries are, to some extent, expressly permitted by the ADA in 42 U.S.C. § 12112(d)(4). The Florida District Court of Appeal, First District, properly declined to arrive at the same conclusion as the Supreme Court of Minnesota in the factually and legally distinct *Huisenga* case, despite Petitioner's urgings.

CONCLUSION

For the foregoing reasons, including Petitioner's failure to preserve any ADA issue for review, failure to generate a record sufficient to conduct such review, failure to articulate a reviewable issue as properly derived from the facts and law in the matter at hand, failure to substantiate the existence of a statutory conflict mandating federal preemption, and failure to demonstrate legally and factually supportive authority for either Petitioner's original, incorrect issue or Respondent's properly stated formulation of a potential issue, this case does not merit further review and the Petition should be denied.

Respectfully submitted,

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